

the actual or threatened discharge or release and to request that an immediate response action be taken.

(2) An emergency is any situation related to a discharge or release requiring immediate action to avoid an irreversible loss of natural resources or to prevent or reduce any continuing danger to natural resources, or a situation in which there is a similar need for emergency action.

(b) *Emergency actions.* If no immediate response actions are taken at the site of the discharge or release by the EPA or the U.S. Coast Guard within the time that the natural resource trustee determines is reasonably necessary, or if such actions are insufficient, the natural resource trustee should exercise any existing authority he may have to take on-site response actions. The natural resource trustee shall determine whether the potentially responsible party, if his identity is known, is taking or will take any response action. If no on-site response actions are taken, the natural resource trustee may undertake limited off-site restoration action consistent with its existing authority to the extent necessary to prevent or reduce the immediate migration of the oil or hazardous substance onto or into the resource for which the Federal or State agency or Indian tribe may assert trusteeship.

(c) *Limitations on emergency actions.* The natural resource trustee may undertake only those actions necessary to abate the emergency situation, consistent with its existing authority. The normal procedures provided in this part must be followed before any additional restoration actions other than those necessary to abate the emergency situation are undertaken. The burden of proving that emergency restoration was required and that restoration costs were reasonable and necessary based on information available at the time rests with the natural resource trustee.

[51 FR 27725, Aug. 1, 1986, as amended at 53 FR 5173, Feb. 22, 1988]

#### § 11.22 Sampling of potentially injured natural resources.

(a) *General limitations.* Until the authorized official has made the determination required in § 11.23 of this part

to proceed with an assessment, field sampling of natural resources should be limited to the conditions identified in this section. All sampling and field work shall be subject to the provisions of § 11.17 of this part concerning safety and applicability of resource protection statutes.

(b) *Early sampling and data collection.* Field samples may be collected or site visits may be made before completing the preassessment screen to preserve data and materials that are likely to be lost if not collected at that time and that will be necessary to the natural resource damage assessment. Field sampling and data collection at this stage should be coordinated with the lead agency under the NCP to minimize duplication of sampling and data collection efforts. Such field sampling and data collection should be limited to:

(1) Samples necessary to preserve perishable materials considered likely to have been affected by, and contain evidence of, the oil or hazardous substance. These samples generally will be biological materials that are either dead or visibly injured and that evidence suggests have been injured by oil or a hazardous substance;

(2) Samples of other ephemeral conditions or material, such as surface water or soil containing or likely to contain oil or a hazardous substance, where those samples may be necessary for identification and for measurement of concentrations, and where necessary samples may be lost because of factors such as dilution, movement, decomposition, or leaching if not taken immediately; and

(3) Counts of dead or visibly injured organisms, which may not be possible to take if delayed because of factors such as decomposition, scavengers, or water movement. Such counts shall be subject to the provisions of § 11.71(l)(5)(iii) of this part.

#### § 11.23 Preassessment screen—general.

(a) *Requirement.* Before beginning any assessment efforts under this part, except as provided for under the emergency restoration provisions of § 11.21 of this part, the authorized official shall complete a preassessment screen

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and make a determination as to whether an assessment under this part shall be carried out.

(b) *Purpose.* The purpose of the preassessment screen is to provide a rapid review of readily available information that focuses on resources for which the Federal or State agency or Indian tribe may assert trusteeship under section 107(f) or section 126(d) of CERCLA. This review should ensure that there is a reasonable probability of making a successful claim before monies and efforts are expended in carrying out an assessment.

(c) *Determination.* When the authorized official has decided to proceed with an assessment under this part, the authorized official shall document the decision in terms of the criteria provided in paragraph (e) of this section in a Preassessment Screen Determination. This Preassessment Screen Determination shall be included in the Report of Assessment described in § 11.90 of this part.

(d) *Content.* The preassessment screen shall be conducted in accordance with the guidance provided in this section and in § 11.24—Preassessment screen—information on the site and § 11.25—Preassessment screen—preliminary identification of resources potentially at risk, of this part.

(e) *Criteria.* Based on information gathered pursuant to the preassessment screen and on information gathered pursuant to the NCP, the authorized official shall make a preliminary determination that all of the following criteria are met before proceeding with an assessment:

(1) A discharge of oil or a release of a hazardous substance has occurred;

(2) Natural resources for which the Federal or State agency or Indian tribe may assert trusteeship under CERCLA have been or are likely to have been adversely affected by the discharge or release;

(3) The quantity and concentration of the discharged oil or released hazardous substance is sufficient to potentially cause injury, as that term is used in this part, to those natural resources;

(4) Data sufficient to pursue an assessment are readily available or likely to be obtained at reasonable cost; and

(5) Response actions, if any, carried out or planned do not or will not sufficiently remedy the injury to natural resources without further action.

(f) *Coordination.* (1) In a situation where response activity is planned or underway at a particular site, assessment activity shall be coordinated with the lead agency consistent with the NCP.

(2) Whenever, as part of a response action under the NCP, a preliminary assessment or an OSC Report is to be, or has been, prepared for the site, the authorized official should consult with the lead agency under the NCP, as necessary, and to the extent possible use information or materials gathered for the preliminary assessment or OSC Report, unless doing so would unnecessarily delay the preassessment screen.

(3) Where a preliminary assessment or an OSC Report does not exist or does not contain the information described in this section, that additional information may be gathered.

(4) If the natural resource trustee already has a process similar to the preassessment screen, and the requirements of the preassessment screen can be satisfied by that process, the processes may be combined to avoid duplication.

(g) *Preassessment phase costs.* (1) The following categories of reasonable and necessary costs may be incurred in the preassessment phase of the damage assessment:

(i) Release detection and identification costs;

(ii) Trustee identification and notification costs;

(iii) Potentially injured resource identification costs;

(iv) Initial sampling, data collection, and evaluation costs;

(v) Site characterization and preassessment screen costs; and

(vi) Any other preassessment costs for activities authorized by §§ 11.20 through 11.25 of this part.

(2) The reasonable and necessary costs for these categories shall be limited to those costs incurred by the authorized official for, and specifically allocable to, site-specific efforts taken during the preassessment phase for assessment of damages to natural resources for which the agency or Indian

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tribe is acting as trustee. Such costs shall be supported by appropriate records and documentation and shall not reflect regular activities performed by the agency or Indian tribe in management of the natural resource. Activities undertaken as part of the preassessment phase shall be taken in a manner that is cost-effective, as that phrase is used in this part.

[51 FR 27725, Aug. 1, 1986, as amended at 53 FR 5173, Feb. 22, 1988]

**§ 11.24 Preassessment screen—information on the site.**

(a) *Information on the site and on the discharge or release.* The authorized official shall obtain and review readily available information concerning:

- (1) The time, quantity, duration, and frequency of the discharge or release;
- (2) The name of the hazardous substance, as provided for in Table 302.4—List of Hazardous Substances and Reportable Quantities, 40 CFR 302.4;
- (3) The history of the current and past use of the site identified as the source of the discharge of oil or release of a hazardous substance;
- (4) Relevant operations occurring at or near the site;
- (5) Additional oil or hazardous substances potentially discharged or released from the site; and
- (6) Potentially responsible parties.

(b) *Damages excluded from liability under CERCLA.* (1) The authorized official shall determine whether the damages:

- (i) Resulting from the discharge or release were specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement or other comparable environmental analysis, that the decision to grant the permit or license authorizes such commitment of natural resources, and that the facility or project was otherwise operating within the terms of its permit or license, so long as, in the case of damages to an Indian tribe occurring pursuant to a Federal permit or license, the issuance of that permit or license was not inconsistent with the fiduciary duty of the United States with respect to such Indian tribe; or
- (ii) And the release of a hazardous substance from which such damages re-

sulted have occurred wholly before enactment of CERCLA; or

(iii) Resulted from the application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 135–135k; or

(iv) Resulted from any other federally permitted release, as defined in section 101(10) of CERCLA; or

(v) Resulting from the release or threatened release of recycled oil from a service station dealer described in section 107(a)(3) or (4) of CERCLA if such recycled oil is not mixed with any other hazardous substance and is stored, treated, transported or otherwise managed in compliance with regulations or standards promulgated pursuant to section 3014 of the Solid Waste Disposal Act and other applicable authorities.

(2) An assessment under this part shall not be continued for potential injuries meeting one or more of the criteria described in paragraph (b)(1) of this section, which are exceptions to liability provided in sections 107(f), (i), and (j) and 114(c) of CERCLA.

(c) *Damages excluded from liability under the CWA.* (1) The authorized official shall determine whether the discharge meets one or more of the exclusions provided in section 311 (a)(2) or (b)(3) of the CWA.

(2) An assessment under this part shall not be continued for potential injuries from discharges meeting one or more of the CWA exclusions provided for in paragraph (c)(1) of this section.

[51 FR 27725, Aug. 1, 1986, as amended at 52 FR 9095, Mar. 20, 1987; 53 FR 5173, Feb. 22, 1988]

**§ 11.25 Preassessment screen—preliminary identification of resources potentially at risk.**

(a) *Preliminary identification of pathways.* (1) The authorized official shall make a preliminary identification of potential exposure pathways to facilitate identification of resources at risk.

(2) Factors to be considered in this determination should include, as appropriate, the circumstances of the discharge or release, the characteristics of the terrain or body of water involved, weather conditions, and the known physical, chemical, and toxicological